Supreme Court, U.S.
FILED
JUL 13 1995
CLERK

(5)

No. 94-1740

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

PACIFIC NORTHWEST GENERATING COOPERATIVE,
Petitioner,
VS.
NORTHWEST POWER PLANNING COUNCIL *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER PNGC

R. DANIEL LINDAHL
Counsel of Record
R. ERICK JOHNSON
Bullivant, Houser, Bailey
Pendergrass & Hoffman
300 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 228-6351
Counsel for Petitioner

July 13, 1995

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I.	
THE CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT ...	2
II.	
IT IS IRRELEVANT THAT THE NINTH CIRCUIT'S DISCUSSION OF THE AMOUNT OF DEFERENCE OWED TO THE STATES AND TRIBES WAS NOT NECESSARY TO THE DECISION	7
III.	
THERE IS A CONFLICT BETWEEN THE NINTH CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT REGARDING THE MEANING OF "DUE WEIGHT"	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

Page

Humphrey's Executor v. United States, 295 U.S. 602 (1935) 8

National Wildlife Federation v. FERC, 912 F.2d 1471 (D.C. Cir. 1990) 8

Northwest Resource Information Center, Inc. v. Northwest Power Planning Council, 35 F.3d 1371 (9th Cir. 1994) 1

Statutes and Rules

16 U.S.C. § 803(j) 8

16 U.S.C. § 839b(h)(7) 2, 7, 8

16 U.S.C. § 839f(e)(5) 9

Sup. Ct. R. 15.6 1

Law Reviews and Newspapers

Blumm, *Columbia Basin Salmon and the Courts: Reviving the Parity Promise*, 25 Envtl. Law 351 (1995) 4

The Oregonian, September 13, 1994 .....

Volkman, *Steering by Dicta*, 25 Envtl. Law 385 (1995) 7

Legislative History

H.R. Rep. No. 96-976, pt. II, 96th Cong., 2d Sess. *reprinted in* 1980 U.S. Code Cong. & Admin. News 6023 3

H.R. Rep. No. 99-507, 99th Cong., 2d Sess. *reprinted in* 1986 U.S. Code Cong. & Admin. News 2496 .. 9

Federal Register

59 Fed. Reg. 67,351 (December 29, 1994) 4

No. 94-1740

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

PACIFIC NORTHWEST GENERATING COOPERATIVE,
Petitioner,
vs.
NORTHWEST POWER PLANNING COUNCIL *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER PNGC

INTRODUCTION

Pacific Northwest Generating Cooperative ("PNGC") seeks a writ of certiorari to review the decision in *Northwest Resource Information Center, Inc. v. Northwest Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994). Three of the 18 respondents oppose PNGC's petition.[1] This reply brief responds to arguments first raised in the briefs in opposition. Sup. Ct. R. 15.6.

[1] Briefs in opposition have been filed by the Northwest Power Planning Council, the Yakama Indian Nation, and the NRIC respondents (Northwest Resource Information Center, Inc., Trout Unlimited, Oregon Natural Resources Council, Idaho Steelhead and Salmon United, and The Wilderness Society).

I.

THE CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

The Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act") directs the Northwest Power Planning Council to give "due weight" to fish and wildlife program recommendations offered by the region's state fish and wildlife agencies and Indian tribes. 16 U.S.C. § 839b(h)(7). The Ninth Circuit decided that the "due weight" clause means that recommendations from the fish agencies and tribes are entitled to a "high degree of deference." Petition for a Writ of Certiorari ("Petition") at 33b-34b. The Ninth Circuit also said that the Northwest Power Planning Council owes a high degree of deference to the fish agencies' and tribes' interpretations of the fish and wildlife provisions of the Northwest Power Act. Petition at 36b. PNGC seeks review of these two decisions.

Respondents NRIC and the Yakama Nation both contend that the petition should be denied because the issue presented is narrow and unimportant. These views are at odds with public pronouncements when the decision was issued.

Immediately after the Ninth Circuit's opinion was issued, Tim Weaver, counsel for the Yakama Indian Nation, was quoted as declaring that "[t]his is going to shake the federal hydro system right down to bedrock." The Oregonian, September 13, 1994, at 1. Weaver's assessment of the decision is representative of the view of most interested parties in the region and demonstrates why the decision must be reviewed: the Ninth Circuit's opinion upsets the Northwest Power Act's carefully crafted balance between fish and power interests by requiring the Power Planning Council to give a "high degree of deference" to the fish and

wildlife program recommendations and statutory interpretations of fish agencies and tribes.

PNGC's petition describes the legislative process that produced the Northwest Power Act's balanced fish and wildlife provisions. Rather than respond to the merits of PNGC's discussion, respondents dismiss PNGC's recital of the legislative history as the tale of a "shadowy 'ad hoc committee' composed of Columbia River special interests." NRIC Brief in Opposition at 8. As experienced counsel for NRIC are well aware, there was nothing "shadowy" about the ad hoc committee, nor (contrary to NRIC's implication) was it comprised of only power interests.

The report of the Committee on Interior and Insular affairs states that section 4(h) of the Northwest Power Act:

> contains detailed provisions concerning the protection, mitigation and enhancement of fish and wildlife on the Columbia River and its tributaries *and incorporates the recommendations proposed by an ad hoc committee of Federal, State and Tribal fisheries agencies, Federal power and water management agencies, and BPA customers.*

H.R. Rep. No. 96-976, pt. II, 96th Cong., 2d Sess., at 43, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6023, 6041 (emphasis added).

Thus, this "shadowy committee" was nothing of the kind. Instead, it was a select group of representatives of fishery agencies, Indian tribes, and power agencies and customers. Furthermore, the group was specifically credited by Congress with developing the provisions that became the fish and wildlife provisions of the Northwest Power Act.

The NRIC respondents argue that the Ninth Circuit's decision is insubstantial because it supposedly affects only a small portion of the country. However, as the NRIC respondents admit, the Council's fish and wildlife program affects

seven western states, which collectively cover an enormous geographic area. NRIC Brief in Opposition at 5. Furthermore, the Council's fish and wildlife program has been described as the largest biological restoration effort ever undertaken. Petition at 4b. A decision that determines how such a massive and expensive program will be created can hardly be described as a matter of only parochial concern.

Furthermore, the issue presented by this Petition has been characterized as the most important point in the Ninth Circuit's lengthy decision. Professor Michael Blumm, whose works were cited frequently in the Ninth Circuit's opinion, has opined that the Ninth Circuit's discussion of the deference owed to state agencies and tribes "will be the opinion's most enduring legacy." Blumm, *Columbia Basin Salmon and the Courts: Reviving the Parity Promise*, 25 Envtl. Law 351 (1995).

Thus, rather than being the narrow and insubstantial matter described by NRIC and the Yakama Nation, the Ninth Circuit's decision was a lightning bolt that is having a profound impact in the Pacific Northwest. The decision's effect can be seen in the Council's actions after the opinion was issued.

As noted in the Brief for Respondent Northwest Power Planning Council, the Council adopted a new fish and wildlife program in December 1994. 59 Fed. Reg. 67,351 (December 29, 1994). That program adopted virtually every measure requested by the states and tribes. Two Council members criticized this hastily prepared and ill-conceived program as being "rushed to adoption in a process motivated more by politics than by biology." 1994 Columbia River Basin Fish and Wildlife Program, Appendix E, at E-1. The two Council members went on to say:

> It is our belief that these particular fish and wildlife program amendments were developed too quickly.

> They will cause the region to spend money it doesn't have and use water that isn't available. They ignore such science as there is, and they are unlikely to be implemented. Even if they are implemented, we are not sure many of them would help fish — or that we ever would know if they did.

1994 Columbia River Basin Fish and Wildlife Program, Appendix E, at E-3.

The Council's misguided 1994 fish and wildlife program, which embraced scientifically unsound concepts supported only by state and tribal entities, came about as a direct result of the Ninth Circuit's decision in this case. The Council's 1994 program states that the Ninth Circuit's "opinion provided valuable assistance in (the] process" of developing the new program. 1994 Columbia River Basin Fish and Wildlife Program at 1-3. Furthermore, the 1994 Program explains the Council's understanding that the Ninth Circuit's decision called for "bolder actions to protect the fish and ... greater deference to the region's fish agencies and Indian tribes when they submit recommendations for program measures." *Id.* Thus, contrary to the arguments presented by NRIC and the Yakama Nation, the Ninth Circuit's decision has already had a significant impact by directing the Council's actions.

The respondents note that neither PNGC nor any other power interest mounted a legal challenge to the 1994 Fish and Wildlife Program. Respondents argue that the absence of any such challenge demonstrates that PNGC and other Pacific Northwest power interests are satisfied with the Council's program.[2] There is no basis for such an inference.

---

[2]Respondents also assert that it is significant that only PNGC has filed a Petition for Certiorari. Respondents fail to explain how redundant petitions would have better articulated the issue presented to this court. Also, the NRIC respondents contend that the other utility and industrial

Instead, there are three reasons why PNGC and other power interests felt no compulsion to seek judicial review of the Council's 1994 Program.

First, PNGC was already fully involved in the present case. There was no need to initiate duplicative litigation in the Ninth Circuit.

Second, the Ninth Circuit has already expressed its views concerning the meaning of the Northwest Power Act. A legal challenge to the Council's 1994 Program was likely to be an exercise in futility in view of the Ninth Circuit's view that fishery agencies and tribes are entitled to a high degree of deference.

Third, in January 1995, the composition of the Council changed significantly as the result of the election of new governors in Oregon and Idaho. In February 1995, the newly constituted Council voted to reexamine the scientific underpinnings of the 1994 Program. The Council's decision to revisit the scientific foundation of its program offered some hope that litigation was not necessary to bring about changes in the Council's program.

In summary, the Ninth Circuit's decision was not a small event in a local spat. Instead, it overturned a carefully crafted balance in a statutory process that results in a program that touches seven states and involves annual expenditures of hundreds of millions of dollars.

---

parties to this case must not support PNGC's petition because they have not filed briefs supporting the petition. Because the Supreme Court Rules do not permit briefs in support of a petition, the absence of such briefs probably reflects these parties' familiarity with the Supreme Court's rules rather than their position on the merits.

II.

IT IS IRRELEVANT THAT THE NINTH CIRCUIT'S DISCUSSION OF THE AMOUNT OF DEFERENCE OWED TO THE STATES AND TRIBES WAS NOT NECESSARY TO THE DECISION

Respondents contend that the Ninth Circuit's discussion of the amount of deference owed to the states and tribes was unnecessary to the decision and therefore should not be reviewed by this Court. This argument has no merit.

It is true that the Ninth Circuit could have remanded the case without "determin[ing] the meaning of § 839b(h)(7)'s mandate that the Council give 'due weight' to the recommendations and expertise of fishery managers . . . ." Petition at 30b. However, the fact is that the court *did* address the issue for the specific purpose of "aid[ing] the parties' efforts on remand." *Id.*

Respondents do not suggest that the Council is free to ignore the Ninth Circuit's directions simply because the Ninth circuit's discussion of the statute was unnecessary to the decision. To the contrary, counsel for the Power Planning Council has stated "I take this opinion very seriously. We will probably argue about some of it if we go back to court, but I do not think this is a collection of loose *dicta*." Volkman, *Steering by Dicta*, 25 Envtl. Law 385 (1995).

Furthermore, nothing in the Council's 1994 Fish and Wildlife Program suggests that the Council does not feel compelled to obey the Ninth Circuit's directives, *dicta* or not. To the contrary, the 1994 Program states that the Council is being guided by the Ninth Circuit's statements that the Council should give greater deference to the region's state fish agencies and Indian tribes. 1994 Columbia River Basin Fish and Wildlife Program at 1-3.

Therefore, whether the Ninth Circuit's interpretation of section 839b(h)(7) was necessary to the decision is irrele-

vant to this petition. The only relevant facts are that the court *did* address the issue, and the Council is complying with the court's direction. None of that will change unless this Court accepts review of this case and corrects the errors in the Ninth Circuit's decision.[3]

III.

THERE IS A CONFLICT BETWEEN THE NINTH CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT REGARDING THE MEANING OF "DUE WEIGHT"

PNGC's petition explained that the Ninth Circuit's interpretation of "due weight" in this case conflicts with the District of Columbia Circuit's decision in *National Wildlife Federation v. FERC*, 912 F.2d 1471 (D.C. Cir. 1990), which involved section 10(j) of the Federal Power Act, 16 U.S.C. § 803(j).

The Yakama Nation agrees with PNGC that the Ninth Circuit and the District of Columbia Circuit have different interpretations of the meaning of "due weight."[4] Yakama

---

[3]The Yakama Nation's reliance on *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) is unavailing. In *Humphrey's Executor* this Court noted that a court's general expressions in one opinion should not control the outcome of other, unrelated cases. *Id.* at 627. *Humphrey's Executor* is inapplicable here for two reasons. First, the Ninth Circuit's discussion of section 839b(h)(7) was not a "general expression" of anything. Instead, as the Yakama Nation admits elsewhere in its brief, the Ninth Circuit's decision was the product of a "laborious analysis." Yakama Nation Brief in Opposition at 2. Second, we are not concerned here with the effect of the Ninth Circuit's decision in a subsequent unrelated case. Instead, we are concerned with its effect in the *very same case*.

[4]Interestingly, the NRIC respondents argue that the District of Columbia Circuit and the Ninth Circuit do *not* disagree regarding the meaning of "due weight."

Nation Brief in Opposition at 19. The Yakama Nation explains the difference by arguing that the phrase "due weight" is meant to have different meanings in the Federal Power Act and the Northwest Power Act. However, the Yakama Nation fails to note that the Federal Power Act borrowed from the Northwest Power Act, so presumably the same phrase in each statute should have the same meaning. H.R. Rep. No. 99-507, 99th Cong., 2d Sess., at 30-31, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2496, 2517-18.

The Yakama Nation and the NRIC respondents also argue that there is no conflict between the circuits concerning the interpretation of the Northwest Power Act because all Northwest Power Act cases must be heard by the Ninth Circuit. 16 U.S.C. § 839f(e)(5). While that may be true because of the Ninth Circuit's role as the exclusive forum for pursuing claims arising under the Northwest Power Act, that procedural anomaly provides no justification for insulating the Ninth Circuit's important decisions in this area from judicial review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: July 13, 1995.

Respectfully submitted,

R. Daniel Lindahl
Counsel of Record
R. Erick Johnson
Bullivant, Houser, Bailey,
Pendergrass & Hoffman
300 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 228-6351

Counsel for Petitioner